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SUPREME COURT, U.S.

No. 99-1408

IN THE

Supreme Court of the United States

GAIL ATWATER, *et al.*,

Petitioners,

v.

CITY OF LAGO VISTA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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Respondents, City of Lago Vista, former Lago Vista Officer Bart Turek, and Police Chief Frank Miller, respectfully submit this Brief in Opposition to the Petition for Writ of Certiorari filed by Petitioners, Gail Atwater, and Michael Haas as next friend of Anya Savannah Haas and Mackinley Xavier Haas. Petitioners seek review of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, rendered on November 24, 1999. Petitioners' request for writ should be denied.

STATEMENT OF THE CASE

I. Statement of Facts.

On March 26, 1997, former Lago Vista Police Officer Turek observed a Dodge pickup truck in which neither the adult driver or the two young children were wearing seatbelts. One of the children was standing on the passenger seat in the truck. In accordance with the Texas law, Officer Turek arrested Petitioner Atwater for failing to wear a seatbelt, failing to seatbelt her children, failure to show proof of financial responsibility and failure to display her driver's license. It is undisputed that she committed each of these offenses. It is undisputed that Texas law authorized Petitioner Atwater's custodial arrest.

Petitioner Atwater was transported to the Lago Vista Police Department, where she waited about fifty minutes for the Magistrate. It is undisputed that no physical force or threats of physical force were used against Petitioner Atwater at any time during this incident. The Magistrate read Petitioner Atwater her rights, and she was released after posting bond.

It is undisputed that Officer Turek had probable cause to believe that Petitioner Atwater committed five criminal offenses. Petitioner Atwater's arrest was effected in a public place, and without the use of excessive physical force. She was subjected to ordinary booking procedures, and was released within an hour.

II. The Proceedings Below.

On August 8, 1997, Petitioners commenced an action against Respondents in the 98th Judicial District Court of Travis County, Texas, alleging a multitude of constitutional and State law claims. Respondents properly removed the litigation to the United States District Court for the Western District of Texas at Austin.

On February 13, 1998, the District Court granted Respondent's Summary Judgment Motion, wholly dismissing Respondents' claims. Petitioners filed Notice of Appeal to the United States Court of Appeals for the Fifth Circuit, and a three-judge panel issued their opinion on January 29, 1999.

The Panel reversed summary judgment in favor of Officer Turek and the City of Lago Vista on Petitioners' Fourth Amendment unreasonable seizure claim, and remanded that issue to District Court. The Panel upheld summary judgment in favor of Respondents on all other constitutional and state law claims. Summary judgment was affirmed in favor of Police Chief Miller on all grounds.

The Fifth Circuit granted rehearing *en banc*, and vacated the panel's decision. After briefing and oral argument, ten

appellate justices held that Petitioner Atwater's custodial arrest did not violate her Fourth Amendment rights, and affirmed the District Court's summary judgment.

REASONS FOR DENYING WRIT

Petitioners ask this Court to grant a Writ of Certiorari in order to determine if the Fourth Amendment limits the use of custodial arrests for fine-only traffic offenses. However, this question has already been resolved by the United States Supreme Court. All custodial arrests, including those for fine-only traffic offenses, must be reasonable. An arrest is reasonable if the officer had probable cause to arrest.

It is undisputed that Officer Turek had probable cause to arrest Petitioner Atwater. The arrest, therefore, complied with the requirements of the Fourth Amendment. The holding of the United States Court of Appeals for the Fifth Circuit recognized and considered Fourth Amendment limits on Petitioner Atwater's arrest. Thus, the Fourth Amendment question presented by Petitioners does not merit additional review.

Petitioners argue that the arrest was unreasonable and violated the Fourth Amendment. They demand additional restrictions, beyond probable cause, to justify an arrest for a fine-only traffic offense. Only in "extraordinary circumstances" has the United States Supreme Court imposed a heightened standard for reviewing an arrest. Those circumstances are not present here. Further, the United States Supreme Court, and the federal Courts of Appeals, have rejected all attempts to create a probable cause "plus" standard for ordinary arrests. The Fifth Circuit opinion is consistent with all previous case law, and correctly states

the law. Petitioner Atwater's custodial arrest complied with the Fourth Amendment. As a result, the Petition for Writ of Certiorari should be denied.

I. THE FOURTH AMENDMENT CONTROLS ALL ARRESTS

The "Question Presented" in the Petition for Writ of Certiorari controls the issue raised for review by the United States Supreme Court. Petitioners ask this Court to determine if custodial arrests are limited by the Fourth Amendment for fine-only traffic offenses. There is no dispute that the Fourth Amendment limits the use of custodial arrests for all offenses, including fine-only traffic offenses.

The Constitution requires that all arrests be reasonable. U.S. CONST. Amendment IV. An arrest is reasonable if it is made with probable cause. *United States v. Robinson*, 414 U.S. 218, 235 (1973); *Michigan v. DeFillippo*, 443 U.S. 31, 36 (1979).

The United States Court of Appeals for the Fifth Circuit found that Petitioner Atwater's arrest complied with the Fourth Amendment limitations. The arrest was constitutional, because it was made with probable cause. If the Court answers Petitioners' question in the affirmative, the Fifth Circuit's holding still stands. As a result, the question presented by Petitioners does not merit United States Supreme Court review.

II. FIFTH CIRCUIT OPINION IS CONSISTENT WITH THIS COURT'S OPINIONS

The Fourth Amendment requires that all arrests be reasonable. Petitioners argue that the Fifth Circuit erred by failing to require more than probable cause in order to determine the reasonableness of her arrest. The Fifth Circuit required probable cause for an ordinary arrest. This is consistent with this Court's requirements.

A. An Arrest is Reasonable if It is Made with Probable Cause.

In its history of evaluating arrests, the United States Supreme Court has recognized that probable cause justifies the arrest and ordinary processing of the suspected offender. *Gerstein v. Pugh*, 420 U.S. 103, 113-14 (1975).

> Under this practical compromise, a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest.

Id. The probable cause test accommodates an individual's right to liberty and the State's duty to control crime. *Brinegar v. United States*, 338 U.S. 160, 176 (1949); *Gerstein*, 420 U.S. at 112. Probable cause is the measure of a reasonable arrest under ordinary circumstances.

Officer Turek had probable cause to believe that Petitioner Atwater committed five criminal offenses.[1] She failed to seatbelt herself, or her two young children. She failed to carry with her proof of insurance or her driver's license. Her arrest was effected in a public place, with probable cause, and without the use of excessive physical force. She was subjected to ordinary booking procedures, and was released within an hour. Petitioner Atwater pled guilty to all of the seatbelt charges. The driver's license and insurance charges were dropped when she produced proof of the documents.

Petitioners do not dispute the probable cause facts. Probable cause authorized Officer Turek to arrest Petitioner Atwater, and to temporarily detain her until she was taken before a magistrate. Officer Turek did not violate Petitioner Atwater's Fourth Amendment rights. As a result, this Petition should be denied.

B. Consideration of Additional Factors, Only Under Extraordinary Circumstances.

Petitioners argue that the Fifth Circuit erred in failing to consider extra factors, other than probable cause, to determine if the arrest was reasonable. This Court has already rejected consideration of additional restrictions when evaluating the reasonableness of the ordinary arrest. *Whren v. United States*, 517 U.S. 806, 813 (1996) (refusing to take into account the subjective intent of the officer or whether

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1. Appellant violated TEXAS TRANSPORTATION CODE ANN., §§ 545.413(a), 545.413(b), 521.025, and 601.051, 601.053 and 601.191.

other officers would have made the arrest, in determining if an arrest is reasonable).

There are only three "extraordinary" circumstances where arrests made with probable cause required further evaluation by this Court. *See, id.* at 818; *Robinson*, 414 U.S. at 325. These "extraordinary" circumstances involve arrests that are either: *1)* made in a home; *2)* involve excessive physical force in effecting the arrest; or *3)* go beyond ordinary booking procedures to effect a physical invasion of the arrestee's bodily integrity. *See, e.g., Welsh v. Wisconsin*, 466 U.S. 740 (1984) (warrantless entry into home); *Tennessee v. Garner*, 471 U.S. 1 (1985) (use of deadly force); *Winston v. Lee*, 470 U.S. 753 (1985) (surgical removal of a bullet). It is undisputed that these "extraordinary" circumstances do not apply to the case at bar.

Consistent with this Court's rulings, the Fifth Circuit correctly decided that Petitioner Atwater's arrest and short detention did not violate her Fourth Amendment rights. As a result, the Petition for Review should be denied.

C. *Knowles v. Iowa* does not conflict with the Fifth Circuit opinion.

In 1999, this Court held that an officer may not perform a full search of an automobile after the officer has issued the driver a citation. *Knowles v. Iowa*, 525 U.S. 113 (1999). Petitioner complains that the Fifth Circuit opinion "eviscerates" the *Knowles* opinion. However, this complaint is unfounded.

Iowa state law authorized officers to either issue a citation, or to take traffic offenders into custody. In *Knowles*,

the Iowa Supreme Court upheld the constitutionality of an officer issuing a citation and still performing a custodial arrest-type searches of the driver and automobile. *Knowles*, 569 N.W.2d 601 (Iowa 1997). The United States Supreme Court reversed the Iowa Supreme Court. It is unconstitutional to perform a custodial arrest-type search if the driver is not subjected to a custodial arrest. *Knowles*, 525 U.S. at 487-88.

Knowles is a search case, holding that police officers must actually arrest the driver in order to perform a post-arrest search. The *Knowles* Court neither addressed nor attempted to restrict the authority of police officers to effect the custodial arrest of traffic offenders. In the instant case, the Fifth Circuit opinion does not address the same issues. It does not conflict with the *Knowles* decision, or with any other holding from this Court.

III. FIFTH CIRCUIT OPINION IS CONSISTENT WITH OPINIONS OF STATE AND FEDERAL COURTS

The United States Supreme Court never required more than probable cause to establish the constitutionality of a public arrest. *Whren*, 517 U.S. at 813. The precedent from other federal and state courts is consistent with this approach. Every Court addressing the question upheld the federal constitutionality of public custodial arrests made with probable cause and in compliance with state law. These Courts refused to impose additional limitations on the right to publicly arrest certain criminal offenders.

A. Consistency Among the Federal Courts of Appeal.

Federal Courts of Appeal uniformly reject all attempts to require more than probable cause in determining whether

an ordinary arrest constitutes a civil rights violation. These Courts declined to consider (a) how serious the offense or punishment was;[2] (b) whether a citation could have been issued in lieu of an arrest;[3] (c) whether state law was complied with;[4] (d) the subjective intent of the officer making the arrest;[5] (e) whether other officers would have made the

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2. *Ricci v. Arlington Heights*, 116 F.3d 288, 290-91 (7th Cir. 1997), *cert. dism'd*, 523 U.S. 613 (1998); *Fisher v. WMATA*, 690 F.2d 1133, 1139 (4th Cir. 1982).

3. *Moore v. Gwinnett County*, 967 F.2d 1495 (11th Cir. 1992) *cert. den.* 506 U.S. 1081 (1993); *Higbee v. City of San Diego*, 911 F.2d 377, 379 (9th Cir. 1990).

4. *See Fields v. City of South Houston*, 922 F.2d 1183 (5th Cir. 1991); *Vargas-Badillo v. Diaz-Torres*, 114 F.3d 3 (1st Cir. 1997); *Pyles v. Raisor*, 60 F.3d 1211, 1215 (6th Cir. 1995); *Barry v. Fowler*, 902 F.2d 770, 772-73 (9th Cir. 1990); *Street v. Surdyka*, 492 F.2d 368, 371-72 (4th Cir. 1974). In each of these cases, the court concluded that probable cause justified the warrantless arrests, despite the violation of state laws and early common law that restricted the arrest of misdemeanor offenders to only offenses that were committed in the officer's presence.

Petitioner's reliance on *United States v. Mota* (982 F.2d 1384 [9th Cir. 1993]) for the contrary position is misplaced. In *Mota*, the Court addresses the admissibility of evidence in a criminal trial. The Court explicitly distinguished its holding from claims involving civil rights (such as its holding in *Barry v. Fowler*, *supra*). *Id.* at 1387. In the context of a § 1983 claim, the Ninth Circuit does not consider a violation of state law as relevant to determining if a civil rights violation occurred. *Id.*

5. *Holland v. City of Portland*, 102 F.3d 6 (1st Cir. 1996); *United States v. Basey*, 816 F.2d 980, 990-91 (5th Cir. 1987).

arrest;[6] or (f) if the arrest complied with usual police department policies or practices.[7]

In each of these cases, probable cause alone was sufficient to establish the reasonableness of the arrest. These federal appellate opinions are consistent with the opinion rendered by the Fifth Circuit in this matter. There is no confusion among the federal courts that justifies Supreme Court intervention.

B. Consistency Among the State Courts.

State courts have addressed a number of issues related to the custodial arrest of traffic offenders. However, none of these opinions control the question presented or argued by the Petitioners. Petitioners fail to cite even one case, on the federal or state level, holding that the United States Constitution requires more than probable cause to effect the public, state-authorized arrest of a misdemeanor offender. As a result, Supreme Court intervention in this matter is not necessary to resolve conflict or inconsistencies.

State courts uphold the custodial arrests of fine-only misdemeanor offenders. *See, e.g., Illinois v. Ramirez*, 618 N.E.2d 638 (Ill. App. – 1st Dist. 1993). These courts consider whether a violation of state law should effect the

6. *Whren*, 517 U.S. at 813-4; *Moore v. Gwinnett County*, 967 F.2d 1495, 1498 (11th Cir. 1992), *cert. den.*, 506 U.S. 1081 (1993).

7. *United States of America v. Trigg*, 878 F.2d 1037, 1041 (7th Cir. 1989), *cert. den.*, 502 U.S. 963 (1991).

constitutionality of the arrest[8]; and whether arrest for civil infractions is authorized.[9]

For instance, the Washington Supreme Court found that state public policy dictated that the custodial arrest of certain misdemeanor offenders was inappropriate. *Washington v. Hehman*, 578 P.2d 527, 529 (Wash. 1978). The Court explicitly acknowledged that the United States Supreme Court never required such a holding. It noted that states were entitled to provide criminal defendants greater rights than the minimum standard required by the Constitution. *Id.*

State court decisions reflect the diversity with which various states establish and enforce their laws. It is uniquely within these bodies' power and authority to establish laws and dictate the mode of their enforcement and punishment. Contrary to Petitioners' assertion, these opinions do not reflect "confusion" in the lower courts about the constitutional standard. Rather they reflect differing approaches to enforcement of their state's laws. The federal constitutional standard for a public arrest that is made in compliance with state law is not questioned by these Courts; probable cause is enough.

8. *See, e.g., Thomas v. State*, 614 So.2d 468, 471 (Fla. 1993).

9. *See, e.g., Barnett v. United States*, 525 A.2d 197, 198-99 (D.C. 1987) (noting that the arrest would only be justified if complainant committed a criminal infraction, as opposed to a civil one).

IV. FIFTH CIRCUIT OPINION IS CONSISTENT WITH EARLY AMERICAN JURISPRUDENCE

Petitioners claim that the common law dictates a different result in this matter. Petitioners note that, in England, common law provided that an officer only had authority to arrest for misdemeanors that constituted a breach of peace, and were committed in their presence. As noted by the Fifth Circuit, Petitioners waived this claim, by failing to raise it until this case was reheard by that Court *en banc*. Morever, the Fifth Circuit's holding is consistent with early American jurisprudence authorizing arrests for all misdemeanors committed in the officer's presence.

A. Breach of Peace Claim was Waived.

It is a well-recognized appellate principle that issues or questions that are not raised to the trial court, are not considered in the reviewing court. *See, e.g., Becker Steel Co. v. Cummings*, 296 U.S. 74, 82 (1935); *Stealgald v. United States*, 451 U.S. 204, 208 (1981). Petitioners argue that the Fifth Circuit erred by failed to consider that Petitioner Atwater's offenses did not constitute breaches of the peace. Petitioners did not raise this common law argument in their pleadings, Summary Judgment Response, or Motion for Rehearing that was presented to the trial court. It was not raised in the Appellate Brief, or in Reply to Appellee's Brief. It is first relied on by Petitioners in the Appellants' Brief filed before Fifth Circuit *en banc* consideration of this matter. Petitioners want this Court to review a question on grounds that the trial court was not given an opportunity to consider, Petitioners waived their complaint.

B. Early American Jurisprudence is Consistent.

Common law does not dictate a different result in this matter. Old English common law allowed officers to arrest offenders committing misdemeanors if the offense constituted a breach of the peace, and was committed in their presence. However, the English and American legislatures have modified this limitation for over one hundred years. *See, e.g., Burroughs v. Eastman*, 59 N.W. 817, 818-820 (Mich. 1894), and cases cited therein. This 1894 court in *Burroughs* cites numerous courts that already approved of legislation authorizing police power to arrest on view for offenses that did not necessarily constitute a breach of the peace.

Moreover, this Old English arrest requirement is ignored in previous Supreme Court decisions as a probable cause standard for public arrests. *See, e.g., Carroll v. United States*, 267 U.S. 132, 156-57 (1925); *United States v. Watson*, 423 U.S. 411, 418 (1976). In 1976, the United States Supreme Court relied upon the proposed Model Code of Pre-Arraignment Procedure. The Code permitted warrantless arrests when misdemeanors were committed in the officer's presence, regardless of whether the offense constituted a breach of the peace. § 120.1, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE.[10]

Early American jurisprudence has long accepted the legislature's power to modify the old English common law arrest limitations. Moreover, Petitioner waived this common law argument by failing to raise it in a timely manner. As a result, the Fifth Circuit correctly sustained summary judgment, and the Petition should be denied.

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10. *See also*, 18 U.S.C.A. § 3052 (since 1951, giving F.B.I. agents authority to arrest for any offense against the United States committed in their presence).

CONCLUSION

Petitioner Atwater committed five violations of Texas law. In accordance with his authority, Respondent/Officer Turek arrested Petitioner Atwater, and briefly detained her until she was released by a magistrate. The Fifth Circuit correctly held that Petitioner Atwater's Fourth Amendment rights were not violated by this arrest.

Review on a writ of certiorari is a matter of this Court's judicial discretion. The Fourth Amendment question presented does not reflect a vital question that justifies this Court's review. Obviously, the Fourth Amendments limits the use of custodial arrests for fine-only traffic offenses, as it does for all offenses. This Court has long recognized that the existence of probable cause ensures that the State's interest in effecting the arrest is balanced by the individual's right of liberty. The Fifth Circuit's opinion is consistent with this Court's holdings regarding the same.

Moreover, the Fifth Circuit opinion does not conflict with the decisions of other United States Courts of Appeals, or that of the state courts. In fact, Petitioners fail to cite even one Court that required more than probable cause to determine the constitutionality of an ordinary, public arrest of a misdemeanor offender. Further, early American jurisprudence has long recognized that the common law breach of peace requirement could be abrogated by legislative action.

An officer's right to arrest when there is probable cause is clearly established by this Court, and the lower courts. The Fifth Circuit opinion is consistent with these decisions, and the Question Presented does not merit further review. As a result, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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